United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

NO. 76-1267

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 76-1267

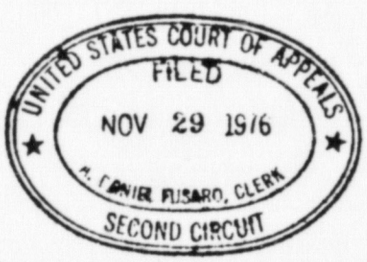
v. :

WILLIAM RODMAN and WILLIAM ROSENBERG, :

Defendants-Appellants. :

----------X

PETITION FOR REHEARING AND
DETERMINATION EN BANC



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Dated: November 29,1976

IN THE UNITED STATES COURT OF APPEALS
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The Appellants, WILLIAM RODMAN and WILLIAM ROSENBERG, respectfully petition this Court to grant a rehearing en banc with respect to its decision of November 24,1976, which affirmed their conviction and judgment of the District Court of having conspired to violate Title 15 United States Code Sections 77q, 77x, 78j (b) and 78 ff of the Securities Law and Title 18 United States Code Section 1341, the mail fraud statute, in violation of Title 18 United States Code, Section 371.

STATEMENT OF FACTS

The Appellants were charged in a one count indictment with having conspired to violate the securities law and the mail fraud statute. The indictment did not allege any substantive offense nor did it allege an overt act of mailing in furtherance of the alleged conspiracy nor was any evidence offered of actual use of the mail in furtherance of the alleged conspiracy.

In substance, the indictment alleged that as of December 3, 1975, the Appellant William Rosenberg accumulated 150,000 shares of Franklin Properties Common Stock. That from on or about November 1, 1975, up to and including December 8,1975, the Appellants Rodman and Rosenberg conspired to violate the Securities laws and mail fraud law by manipulating the price of Franklin Properties Common Stock to One ($1.00) Dollar a share and then paying James Kenneth

Noonan, a broker with Layner Dreskin Company, Fifty ($.50) cents a share cash bribe for each share of Franklin Properties stock he sold to his customers.

On appeal to the United States Court of Appeals the Appellants claimed that the government failed to prove that the Appellants agreed and conspired to use the mail in furtherance of the alleged conspiracy. The Appellants claimed that the evidence was insufficient to meet the standard of proof as to agreement and intent to use the mail set forth in the case of Farmer v. United States, 233 F. 903 (2nd Cir. 1915) and its progeny.

The government contended that the case of United States v. Feola, 420 U.S. 671 (1975) had modified the existing law so that the government need only prove that the mails would probably have been used had the conspiracy not been aborted. The government also contended that proof of probable use of the mail satisfied the holdings in the cases of Farmer v. United States, Supra, and its progeny.

The Court of Appeals affirmed the judgment of conviction without opinion. The Appellants urge that the Court of Appeals erred in rejecting their argument and further urge that the judgment, even if affirmed, should not be affirmed summarily as this case is one of first impression and national importance as it is the first case in any circuit wherein anyone has ever been convicted of

conspiracy to commit mail fraud or securities fraud predicated upon use of the mail where the indictment did not contain an overt act of mailing or a substantive count of mail or securities fraud or any evidence that the mail was actually used. This is particularly important as use of the mail is the jurisdictional element in mail fraud cases and was elected by the government as the jurisdictional element in its proof that the Appellants conspired to violate the securities laws. The decision of the Court of Appeals will open the federal court system to a flood of cases predicated upon conspiracy to commit mail fraud without any standard being defined as to what the government must be prepared to prove beyond a reasonable doubt in order to sustain federal jurisdiction. It is urgent that the cases of Farmer v. United States, Supra, and its progeny be reevaluated in light of the Supreme Court's recent decision in the case of United States v. Feola, Supra and that the Court of Appeals address itself to this question raised in the appeal and render a written decision to act as a guide for future cases in this circuit.

ARGUMENT

POINT NO. I

PROOF BEYOND A REASONABLE DOUBT THAT USE OF THE MAIL WAS INDISPENSABLE IN CARRYING OUT THE SCHEME TO DEFRAUD WAS REQUIRED IN ORDER TO SUPPLY THE JURISDICTIONAL ELEMENT OF THE CRIME OF CONSPIRACY TO COMMIT MAIL FRAUD.

The Court of Appeals by affirming the Appellants' judgment of conviction without opinion seems to have adopted the argument of the government that in a case of conspiracy to commit mail fraud, even when there is no actual mailing upon which to predicate federal jurisdiction, it is only necessary for the government to prove that use of the mails could reasonably have been foreseen by the defendants; the same standard applicable to the substantive offense. The government erroneously relies for this proposition on the recent case of United States v. Feola, 420 U.S. 671 (1975).

Fraud is not a federal crime unless it is coupled with some proscribed act which confers federal jurisdiction. In the case at bar, at the election of the government, the proscribed act relied upon by the government was use of the mail. As the proscribed act did not occur, the government had the burden of proving beyond a reasonable doubt that the Appellants intended and agreed to use the mail. Guardalibini v. United States, 128 F. 2d. 984 (5th Cir. 1942); Mazurosky v. United States, 100 F. 2d. 958 (9th Cir. 1939); Burns v.

United States, 279 F. 982 (10th Cir. 1922); Morris v. United States, 7 F. 2d. 785 (8th Cir. 1925); Banister v. United States, 379 F. 2d. 750 (5th Cir. 1967); United States v. Cohen, 145 F. 2d. 82 (2d Cir. 1944); Farmer v. United States, 223 F. 903 (2d Cir. 1915); Schwartzberg v. United States, 241 F. 348 (2d Cir. 1917); Raffe v. United States, 65 S. Ct. 553, 323 U.S. 799 (1944); Mansfield v. United States, 155 F. 2d. 952 (5th Cir. 1946).

This burden is not met by evidence tending to show that use of the mails could reasonably have been forseen by the Appellants. The test used to determine the sufficiency of evidence with regard to proof of an intent and agreement to use the mail was set forth in Farmer v. United States, Supra, where the Court stated:

> "Usually when the scheme is unfolded it is apparent that it could not be carried out without the use of the mails and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails." (Italics supplied).

The issue as presented in the Farmer case is whether the scheme could have been carried out without the use of the mails. This is different than merely deciding whether the use of the mails could reasonably have been foreseen by the Appellants. The foreseeability standard is applicable only if an actual mailing has taken place and the question remains whether the mailing was caused by the defendant.

Pereira v. United States, 347 U.S. 1 (1954); United States v. Finkelstein, 526 F. 2d 517 (2d Cir. 1975). It does not apply when there has not been a mailing.

The Court in Mansfield v. United States, Supra, applied the standard set forth in Farmer v. United States, Supra and held that the defendants had the requisite specific intent to use the mail as the scheme could not have been carried out without the use of the mails. (Italics supplied). The Court said that the use of the mails was indispensable in carrying out the scheme. The same standard was applied in the case Blue v. United States, 138 F. 2d. 351 (6th Cir. 1943). In Banister v. United States, Supra, the Court found the requisite specific intent to use the mail because use of the mail "would be required as an integral part of the scheme". (Italics supplied). In Schwartzberg v. United States, Supra, the Court citing the Farmer case reversed a conviction for conspiracy to commit mail fraud because use of the mail was not an integral part of the scheme. In the case of United States v. MacNamara, 91 F. 2d. 986 (2d Cir. 1937), the Court stated that the offense of conspiracy to use the mails to defraud consists of a scheme devised or intended to be devised and use of the mails in execution or attempted execution thereof. (Italics supplied).

The government has been unable to cite one case in any circuit which is contra to any of the cases cited herein. The case of United States v. Feola, Supra, is not contra to said decision nor did it address itself to the suffi iency of evidence necessary to prove a conspiracy to commit mail fraud. The Feola case involved Title 18 United States Code, Section 111 and contained both a conspiracy count and a substantive count. The statute makes it a federal crime to assault a federal officer while engaged in or on account of the performance of his official duties. The proscribed act is to assault a federal employee. A federal officer was in fact assaulted. The defendant contended that his conviction for conspiracy should be reversed as there was insufficient evidence to prove that he knew the person assaulted was in fact a federal employee. The Court held that as the substantive statute did not require a specific intent to assault a federal officer, no greater scienter requirement can be engrafted upon the conspiracy offense, which is merely an agreement to commit the act proscribed by Section 111. (Italics supplied).

The Court held that as the substantive offense was actually committed the government need not prove a specific intent to assault a federal officer in order to sustain its burden on the conspiracy count. Proof of intent to assault was sufficient as the victim of the assault was in fact a federal officer. The Court in referring

to the conspiracy statute stated:

> "A natural reading of these words would be that since one can violate a criminal statute simply by engaging in the forbidden conduct, a conspiracy to commit that offense is nothing more than an agreement to engage in the prohibited conduct. Then where, as here, the substantive statute does not require that an assailant knew the official status of his victim, there is nothing on the face of the conspiracy statute that would seem to require that those agreeing to the assault have a greater degree of knowledge." (Italics Supplied).

However, the Feola court did not hold that knowledge of the identity of the intended victim is always irrelevant. On the contrary, the court stated:

> "Again we point out, however, that the state of knowledge of the parties is not always irrelevant in a proceeding charging a violation of conspiracy law. First, the knowledge of the parties, is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense. Second, whether conspirators knew the official identity of their quarry may be important, in some cases, in establishing the existence of federal jurisdiction. The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is when a federal officer is attacked." (Italics supplied).

In the case at bar the substantive offense was not committed.

The government thus had the burden of proving facts to establish the existence of federal jurisdiction. To establish federal jurisdiction, the agreement must be fairly characterized as one calling for use of the mail to accomplish its goals. This is consistent with the position taken by the Feola court where the court stated:

> Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or some unique characteristic, as the punative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victims actual identity and even though they would not have agreed to the assault had they known that identity." (Italics supplied).

The remaining question is whether the proof offered by the government was sufficient so that the conspiratorial agreement could be fairly characterized as one calling for the use of the mail to accomplish its goals. To determine the sufficiency of the proof we must look to the standard or measure established by Farmer v. United States, Supra, and its progeny. The questions to be answered is whether the scheme could have been carried out without the use of the mail; was the use of the mail indispensable to effectuate the scheme;

was the use of the mail required as an integral part of the scheme. Whether the use of the mail was foreseeable., absent an actual mailing, is not the proper standard to be used in determining whether the defendants agreed and intended to use the mail.

The decision of the Court of Appeals in this case is contrary to every case heretofore decided in this circuit. Furthermore, the decision in this case would be the first in which the question of the sufficiency of the evidence on a conspiracy conviction was reviewed where there is no substantive count of mail fraud or overt act of mailing to confer federal jurisdiction. It is for these reasons that the Appellants urge this Court to grant this petition for rehearing and determination en banc.

CONCLUSION

For the foregoing reasons, the Appellants petition for a rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the attached Petition For Rehearing and Determination En Banc has been furnished by mail this 29th day of November, 1976 to John Lowe, Assistant United States Attorney, Dept. of Justice, U.S. Southern District, United States Courthouse, Foley Square, New York, New York.

Morton Berger

MORTON BERGER